UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC **CASE 07-CA-053570**

and

MICHAEL ANTHONY HENSON, AN INDIVIDUAL

BRIEF IN SUPPORT OF GENERAL MOTORS LLC'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

This case presents an issue of first impression for the NLRB. At issue is whether the *GM Employee and Representative Social Media Policy* ("Policy" or "Social Media Policy") promulgated by General Motors LLC ("GM" or "Company") to provide guidelines for employee use of social media communications unlawfully infringes upon the Section 7 rights of employees to communicate about wages, hours and working conditions. Significantly, the Board has never held that Section 7 of the National Labor Relations Act ("NLRA" or "Act") protects employee communications on social media sites. Accordingly, this case presents an opportunity for the Board to determine whether the protective scope of Section 7 of the NLRA extends to social media activities and, if so, the limits of such protections.

In this case, there is no argument that GM's Social Media Policy directly infringes on Section 7 rights or that the Policy has been discriminatorily applied. At the March 15, 2012 hearing in this case, Counsel for the Acting General Counsel conceded these facts. The narrow issue presented in the Acting General Counsel's complaint is whether the work rule indirectly infringes on employees' Section 7 rights. It is well-settled that an employer's work rule setting forth guidelines or limits on employee communications cannot be deemed unlawful under Section 8(a)(1) of the National Labor Relations Act ("NLRA") unless employees would reasonably construe the rule's language to prohibit Section 7 activity. The National Labor Relations Board ("Board") has cautioned that – when assessing whether a particular rule could be reasonably construed to prohibit Section 7 activity – the employer's work rule must be afforded a reasonable interpretation, and must be read in context, without assuming improper interference with employee rights.

GM's Social Media Policy clearly advises employees of their obligation to use social media in a responsible manner that is consistent with other long-standing, established GM policies. The principal purpose of this Policy is to ensure that employees – as well as independent contractors – comply with a host of laws in the United States and overseas in their communications that utilize social media. For example, GM's Policy:

- Restricts disclosure of non-public company information related to the Company's financial performance, in compliance with insider trading regulations promulgated by the U.S. Securities and Exchange Commission ("SEC");
- Advises employees regarding transparency and accuracy when engaging in discussion related to GM, in compliance with Federal Trade Commission ("FTC") guidelines regarding testimonials and endorsements by individuals who have a material connection to GM;
- Provides guidance concerning copyright laws, publicity laws and privacy laws when using the proprietary information of others.

In short, the GM Social Media Policy serves a number of completely legitimate purposes with respect to those forms of employee communication that are broadcasted to customers, suppliers, and/or the general public.

The GM Social Media Policy is absolutely clear that it does not in any way infringe or limit Section 7 rights. It includes an express notice that the Policy will be administered in compliance with applicable laws and regulations, specifically including Section 7 of the NLRA. Therefore, GM employees, could not possibly reasonably construe the Policy as limiting Section 7 rights as the evidence on the record reflects that employees have

continued to engage in robust dialogue concerning all manner of concerns protected by Section 7.

Nevertheless, the NLRB Acting General Counsel has alleged – and an Administrative Law Judge ("ALJ") has found – that GM's Social Media Policy violates Section 8(a)(1) of the NLRA because employees would reasonably construe the Policy's language to prohibit Section 7 activity. That conclusion by the ALJ was error and should be reversed. Companies like GM have valid and significant reasons for maintaining social media policies that are carefully calibrated to restrict improper or illegal statements without infringing on protected inter-employee communications. The Board should conclude that such policies are lawful and do not infringe upon employees' Section 7 rights.

II. PROCEDURAL HISTORY

This matter stems from an NLRB charge that was filed against GM on March 23, 2011, by the Charging Party, Michael Anthony Henson. Mr. Henson is an hourly, UAW represented employee from GM's Lansing Delta Township facility in Lansing, Michigan.

Mr. Henson filed a charge with the NLRB on March 23, 2011, alleging that he was disciplined due to protected activities. Mr. Henson's charge was later amended on May 17, 2011, to include the allegation that GM's Social Media Policy restricts employees in union and/or protected activities. The NLRB subsequently withdrew the portion of Mr. Henson's charge related to the allegation that he was disciplined for engaging in protected activity, but maintained the allegation that GM's Social Media Policy restricts employees in union and/or protected activities.

The hearing on the Amended Complaint alleging that GM violated Section 8(a)(1) of the Act was conducted before ALJ Ira Sandron, on March 15, 2012. (ALJD at 1)[1] In his Decision, the ALJ incorrectly found that GM violated Section 8(a)(1) of the Act by promulgating and maintaining certain provisions in its Social Media Policy. The Policy provisions that the ALJ found unlawful are as follows:

> ...be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.... Non-public company information includes:
>
> - Any topic related to the financial performance of the company;....
> - Information that has not already been disclosed by authorized persons in a public forum; and
> - Personal Information about another GM employee, such as his or her...performance, compensation....
>
> When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with GM Communications or GM Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.[2]
>
> - ...Obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally shareable or that you have the owner's permission...
> - Get permission before posting photos, video, quotes or personal information of anyone other than you online....

[1] References to the ALJ's Decision are referenced as "ALJD".

[2] Counsel for the Acting General Counsel was permitted to amend the complaint to include the sentence "Failure to stay within these guidelines may lead to disciplinary action." at the March 15, 2012, hearing despite GM's objection to the inclusion of this sentence.

The ALJ dismissed all other allegations from the Amended Complaint. GM's exceptions focus on the ALJ incorrectly finding that its maintenance of the Policy provisions recited above are a violation of Section 8(a)(1) of the Act.

III. BACKGROUND

GM's Social Media Policy is a global policy that was implemented in January 2011. (Tr. 21: 3-7; Tr.22: 1-6). The Policy applies to GM employees and GM representatives, and provides guidance about the appropriate use of social media. The Social Media Policy advises GM employees and GM representatives that it is a restatement of GM's existing policies as applied to social media. The relevant part of the Policy reads as follows:

> This Social Media Policy can be summarized as "New Tools, Old Rules," since it is really a summary of existing GM policies and how they apply to GM employees and representatives (agencies, contract and fee-for-service workers) who participate in social media. See the Corporate Policy Manual for all GM Policies. (GC Exh. 1(h))

GM's Social Media Policy also contains a Section 7 notice provision that advises GM employees that "GM's Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)." (GC Exh. 1(h))

In spite of these provisions and other clear language in GM's Social Media Policy, the Regional Director issued a Complaint against the Company alleging that specific provisions in GM's Social Media Policy violate Section 8(a)(1) of the Act because those provisions are overbroad and vague, which could tend to chill employees' exercise of their Section 7 rights. The Specific Policy provisions identified in the NLRB's Complaint are as follows:

> <u>Use Good Judgment About What You Share And How You Share</u>
>
> ...be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.... Non-public company information includes:
>
> - Any topic related to the financial performance of the company;....

- Information that has not already been disclosed by authorized persons in a public forum; and

- Personal Information about another GM employee, such as his or her...performance, compensation....

When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with GM Communications or GM Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.[3]

- ...Obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally shareable or that you have the owner's permission...

- Get permission before posting photos, video, quotes or personal information of anyone other than you online....

- Do not incorporate GM logos, trademarks...in your posts.

Treat Everyone with Respect

...Offensive, demeaning, abusive or inappropriate remarks are as out-of-place online as they are offline....

Personal References on Social Media Sites

...Think carefully about "friending" coworkers...on external social media sites. Communications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate on-line...

Internal Social Media

...

- Report any unusual or inappropriate internal social media activity to the system administrator

IV. ARGUMENT

[3] The General Counsel was permitted to amend its complaint to include this sentence at the March 15, 2012, hearing despite GM's objection to the inclusion of this sentence.

The ALJ's conclusion that certain portions of GM's Social Media Policy violate Section 8(a)(1) of the Act is contrary to the evidence adduced at the March 15, 2012 hearing in this matter and clearly erroneous as a matter of law. At issue is whether GM's maintenance of its Social Media Policy violates Section 8(a)(1) of the NLRA because employees would reasonably construe the rule's language to prohibit Section 7 activity. In determining whether an employer's maintenance of a work rule violates Section 8(a)(1) of the NLRA, the NLRB first determines whether an employer's maintenance of a work rule violates the Act by explicitly prohibiting Section 7 rights. If the rule does not explicitly restrict Section 7 protected activities, the rule will only violate the Act if (1) employees would reasonably construe the rule's language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)

In the instant matter, Counsel for the Acting General Counsel alleged only that GM's maintenance of certain provisions in its Social Media Policy violates Section 8(a)(1) of the NLRA because these provisions are vague and overly broad, thereby leading employees to reasonably construe the provisions to prohibit Section 7 activity. Counsel for the Acting General Counsel had the burden of proving that the allegedly unlawful provisions of GM's Social Media Policy can reasonably be interpreted in a way that would tend to chill Section 7 activity.

The Board in *Lutheran Heritage* cautioned that in reviewing an employer's work rules to determine whether they would tend to chill Section 7 Activity, "the Board must...give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646. Counsel for the Acting General Counsel's allegations only have merit if the

principles for reasonably construing work rules, as articulated by the Board in *Lutheran Heritage,* are ignored.

When the rules of construction articulated by the Board in *Lutheran Heritage* are applied to the allegedly unlawful provisions in GM's Social Media Policy, it is evident that GM's maintenance of those provisions is not a violation of Section 8(a)(1) of the NLRA.

When applying Lutheran Heritage's principles to GM's Social Media Policy, it is important to consider two very important provisions in the Policy. First, the opening paragraph of the Policy clearly and unambiguously orients employees by advising that the Social Media Policy is a statement of GM's "Old Rules". (GC Exh. 1(h)) That is, GM's existing policies (e.g., anti-harassment policies, anti-discrimination policies, workplace violence policies, privacy policies) are used to provide additional reference points for employees' understanding of their obligations while on social media websites. Employees are, therefore, immediately on notice about the Company's expectations with respect to conduct.

Second, the Policy also specifically states that it will be administered in compliance with Section 7 of the NLRA. This unambiguous statement that the Company will administer the Policy so as to comply with Section 7 puts employees on notice that the Policy will not impinge upon their Section 7 rights.

While these two Policy provisions certainly aid in employees' understanding of GM's Social Media Policy, even in their absence, the allegedly unlawful Policy provisions are, themselves, clear and unambiguous when read in accordance with the principles outlined by the Board in *Lutheran Heritage.*

When the entire policy is reviewed in context, it is difficult to see how any employee could reasonably read its allegedly unlawful provisions to restrict Section 7 activities.

In an attempt to find a violation of the Act, Counsel for the Acting General Counsel surgically dissected specific sections of GM's comprehensive Social Media Policy and assigned them theoretical definitions that may only be derived from presuming that the provisions violate Section 7. Unfortunately, the ALJ in finding certain GM Policy provisions unlawful has adopted this clearly unreasonable approach. This parsing of language and the assignment of theoretical meanings is certainly contrary to a reasonable reading based on the context of GM's Policy provisions. Moreover, it is contrary to the law.

GM's Social Media Policy is comprised of the core policies maintained by GM to ensure compliance with state and federal employment laws, with SEC and FTC requirements, export control requirements (laws prohibiting trade with certain countries), with privacy and publicity laws, and to protect inventions, marketing strategies and the like. There is absolutely nothing in the Policy that would suggest that it could reasonably chill conduct protected by Section 7; rather, the Policy essentially reflects GM's efforts to ensure its compliance with laws and the protection of its products and competitive advantages. When one considers the context of the allegedly unlawful Policy provisions, and the existence of a Section 7 notice provision in the Policy, in combination with evidence that employees freely discuss working conditions without concerns about retaliation or retribution, the only reasonable conclusions are that the ALJ's findings against GM are unsupported and that GM's conduct does not offend the Act.

A. When Read In Context The Provisions Of GM's Social Media Policy Are Lawful.

The Board and courts have steadfastly maintained that context is important when reviewing employers' rules to determine whether they have a tendency to chill employees' exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Lutheran Heritage*, 343 NLRB at 646; *Adtranz ABB Daimler-Benz Transp., N.A. Inc. v. NLRB, 253 F.3d 19 (D.C. Cir. 2001)*; *Tradesman International*, 338 NLRB 460, 462 (2002) The Board has advised that an employer's work rules must be given a reasonable interpretation. The Board has consistently indicated that it will not find a violation simply because a rule could conceivably be interpreted to prohibit Section 7 activity. *Lutheran Heritage*, 343 NLRB at 647; *Palms Hotel and Casino*, 344 NLRB 1363, 1368 (2005) (advising "We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it").

Furthermore, the Board recognizes that "[W]ork rules are necessarily general in nature" *Lutheran Heritage*, 343 NLRB at 648, and employers are not required to "anticipate and catalogue in their work rules every instance in which... language might conceivably be protected by (or exempted from the protection of) Section 7." Id at 648. Compliance with Section 8(a)(1) does not, therefore, require GM to publish a Policy that sets forth an "exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply" *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998).

The Board has also cautioned that employers' work rules should not be parsed and phrases should not be read in isolation. *Lafayette Park Hotel*, 326 NLRB 824, 825. Instead, the context of the rule must be considered in determining its reasonable interpretation. For example, in *Claremont Resort and Spa*, 344 NLRB 832 (2005), the Board found that a rule

prohibiting negative conversations about managers had a potential chilling effect on Section 7 activities because the rule was amongst a list of policies regarding working conditions and there was no further clarification or examples to provide context. Id at 836.

Conversely, in *Tradesman International*, 338 NLRB 460, 462 (2002), the Board did not find a chilling effect where rules prohibiting slanderous statements or statements detrimental to the company were included on a list of prohibited conduct that included harassment and sabotage because in light of the context (i.e., list of egregious behavior), employees could not reasonably believe that the rule applied to Section 7 activity. The Board also did not find a chilling effect where rules prohibited disloyal, disruptive, competitive, or damaging conduct because the rules addressed legitimate business concerns, and gave examples of the type of conduct proscribed. Id at 461-462.

GM's Policy provisions are distinguishable from the rules that were found to be unlawful in *Claremont Resort and Spa.* While the employer in *Claremont Resort and Spa* maintained a mere list of policies about working conditions, GM's Social Media Policy is unambiguous and comprehensive. Moreover, like the lawful rules in *Tradesman*, GM's Policy provides examples of prohibited conduct and uses references to other existing GM policies to provide guidance about the manner in which the Social Media Policy will be administered. It is also important to note that, GM's Social Media Policy, unlike the rules in *Tradesman*, also specifically advises employees that it will be administered in compliance with Section 7 of the NLRA. Thus, GM's Social Media Policy does even more than those found to be lawful in *Tradesman.*

In parsing out the allegedly unlawful provision of GM's Social Media Policy, the ALJ failed to adequately consider the Policy's Section 7 notice provision. The Section 7 notice

provision not only advises employees that the Policy will be administered "in compliance with applicable laws and regulations", but it also specifically states that this includes Section 7 of the National Labor Relations Act.[4]

B. In Determining Whether The Provisions Of GM's Social Media Policy Are Lawful, Due Consideration Must Also Be Given To GM's Legitimate Business Reasons For Promulgating The Social Media Policy And GM's Actions.

When construing an employer's rules to determine whether they would reasonably tend to chill Section 7 activity, the Board's review should not be limited to the four corners of the rule. The Board has given consideration to an employer's proffered business reasons for promulgating a rule when determining whether the rule has a reasonable tendency to chill Section 7 activity. *Lafayette Park Hotel*, 326 NLRB at 827 (indicating that employees would understand the legitimate reasons given by the employer for promulgating a rule.) The Board, in deciding *Lafayette Park Hotel* considered the fact that employees would not find a rule ambiguous because they would recognize the employer's proffered legitimate business reason for promulgating the rule. Id. Similarly, in *Tradesman Internat*ional, 338 NLRB 460, 461 (2002), the Board considered the legitimate business concerns addressed by the employer's rule.

Moreover, in reviewing an employer's work rules, the Board and the Acting General Counsel have also given consideration to an employer's actions. In *Tradesman International* the Board considered the employer's actions (i.e., enforcing the rule against employees for engaging in Section 7 activities, promulgating the rule in response to union or protected activity, or exhibiting anti-union animus). *Tradesman International* at 641-642 (citing the *Lafayette Park Hotel* Board's reliance on the absence of these factors in determining that an

[4] Since 2010, GM has also posted notices at all of its facilities that advise employees of their Section 7 rights. (Tr. 110 15-25; 111 4-25).

allegedly overbroad rule did not violate Section 8(a)(1).) Additional support for this proposition can also be found in the *Report of the Acting General Counsel Concerning Social Media Cases, Operations*-Mgmt. Mem. 12-31 (Jan.24, 2012), wherein the Acting General Counsel advised that an employer's application of its social media policy to restrict employees' protected Facebook discussions would "..reasonably lead employees to conclude that protected complaints about their working conditions were prohibited." See OM 12-31at 16.

At the March 15, 2012 hearing on this matter, GM properly introduced a business record consisting of a transcript of posts from one of GM's internal social media sites, GM Overdrive. (R Exh. 1) The transcript contained posts documenting employees' discussions about wages, benefits, union organizing, and other terms and conditions of employment on GM's social media sites, even after the Policy had been promulgated. This evidence provides insight into the reasonable beliefs of GM's employees that GM's Social Media Policy does not impinge on speech protected by the Act. [5] Quite simply, the transcript provides objective evidence that employees did not feel their Section 7 rights were chilled.[6] In the General Counsel's Advice Memorandum for Sears (Roebuck), GC Advice Memorandum, *Sears Holdings*, 18-CA-19081 (December 4, 2009) the General Counsel made a similar observation noting that despite an allegedly overbroad provision of Sears' social media policy, "list members openly continued to use the listserv to discuss the Union campaign and the relative merits of unionization." Id at 3.

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[5] Case law that addressed employees' reasonable beliefs about their employer's proffered legitimate business reason for promulgating a rule did not require that all employees in the company hold the same reasonable beliefs. See *Lafayette Park Hotel*, 326 NLRB at 827 (indicating that employees would understand the legitimate reasons given by the employer for promulgating a rule.)

[6] GM also attempted to provide witness testimony at the hearing that the UAW, which represents tens of thousands of GM's employees did not raise the alleged chilling effect of the Policy provisions as an issue of concern during 2011 contract bargaining. (TR. 95-96)

In addition, GM's witnesses at the March 15, 2012, hearing testified that no salaried employees at GM had raised concerns about the alleged chilling effect of GM's Social Media Policy through GM's employee appeal process, the Open Door Process. (Tr. 104-105). Moreover, even where employees had an opportunity to voice anonymous complaints about the alleged chilling effect of GM's Policy, no such complaints have been raised. (Tr. At 117)

V. ANALYSIS

A. The ALJ Erred in Finding that GM Violated Section 8(a)(1) of the NLRA by Maintaining a Social Media Policy that Advises Employees to Ensure that Information that they Post is "Completely Accurate and Not Misleading" (Exceptions 1, 2, 3, 4, 7, 8, 12, 13, 14, 15, 16, 17, 22)

In his Decision, the ALJ found unlawful the provision in GM's Social Media Policy that advises employees to "be sure that your posts are completely accurate and not misleading". The relevant part of the provision reads as follows:

> If you engage in a discussion related to GM, in addition to disclosing that you work for GM and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site. If you are in doubt, review the GM Media (media.gm.com) site. If you are still in doubt, don't post.

The ALJ reasoned that "the fact that Section 7 communications are false, misleading, or inaccurate does not per se strip them of the Act's protection." (ALJD at 5) In support of his position, the ALJ cited *Mastec Advanced Technologies, 357 NLRB No. 17, slip op. at 6 (2011)*; *Sprint / United Management Co., 339 NLRB 1012, 1018 (2003)*, and *TNT Logistics North America, Inc., 347 NLRB 568, 569 (2006)*, revd. sub nom. *513 F.3d 600 (6th Cir. 2008).*

In *Mastec, Sprint/United Management,* and *TNT Logistics,* the Board applied a standard of review that was articulated by the Supreme Court in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) to determine whether false and misleading statements made by employees involved in a labor controversy were protected

by Section 7. This standard of review is only applicable to a very specific classification of employee statements - statements made during labor controversies that are intended to persuade third parties. In each case cited by the ALJ, the context and content of employees' statements were evaluated to determine whether they were "so disloyal, reckless, or maliciously untrue as to lose the Act's protection" *Mastec* at 5 (citing *Mountain Shadows Golf Resort,* 330 NLRB 1238, 1240 (2000)). The ALJ's application of *Jefferson Standard*, which is intended for the review of specific employee statements, to the Policy provision in GM's Social Media Policy is reversible error.

Since GM's Policy provision does not explicitly restrict Section 7 activity, it will only violate Section 8(a)(1) upon a showing that employees would reasonably construe the language to prohibit Section 7 activity. In reviewing the Policy provision, the only question that was before the ALJ was whether, given the context of the Policy provision, GM's employees would reasonably believe that statements they make while engaging in Section 7 activities must be "completely accurate and not misleading". The ALJ's review of this question required him to give the Policy's provision a reasonable reading in the context of the broader Policy, without ascribing an unlawful meaning - consistent with the standard identified by the Board in *Lutheran Heritage. Lutheran Heritage,* 343 NLRB at 646 Had the ALJ applied the *Lutheran Heritage* standard to GM's Policy provision, he would have concluded that the Policy provision is lawful.

The Policy provision simply advises employees to first, be transparent about their relationship with GM ("If you engage in a discussion related to GM, in addition to disclosing that you work for GM and that your views are personal..."). The provision then goes on to advise employees to be "completely accurate and not misleading "with respect to

"discussions related to GM". Most employees would correctly interpret these sentences to mean that when discussing GM, they should disclose their employment relationship and be truthful and forthright about GM's products and services. If employees harbor any doubts as to whether "discussions related to GM" include statements that may be protected by Section 7, those doubts should be erased by the next sentence of the Policy that advises "If you are in doubt, review the GM Media (media.gm.com) site." as this website provides GM employees and the public with information about GM, including product information, facts about the company, press releases and photos of GM products. This reference to GM Media site clearly demonstrates that the provision about posts being "completely accurate and not misleading" is about ensuring that truthful information regarding GM's products and services is disseminated by individuals who have a material relationship to the Company. GM advises employees and contractors of the importance of being transparent about their material relationship to the Company and gives them the tools to be "completely accurate and not misleading" not only because it is the right thing to do from an ethical perspective, but also because GM has a legal obligation under the FTC Act to ensure that individuals with material connections to the Company do not make false or misleading claims about GM's products and services.[7]

It should be clear to any reasonable reader that this Policy provision does not impinge upon Section 7 rights; but, if after considering the context of this Policy provision, and giving the language a reasonable interpretation there is still a scintilla of doubt, any remaining doubt should be laid to rest by the Policy's provision that advises employees that the Policy will be administered in compliance with applicable laws and Section 7 of the NLRA.

[7] See the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

B. The ALJ Erred In Finding That GM Violated Section 8(a)(1) Of The NLRA By Maintaining A Social Media Policy That Advises Employees Not To Disclose Non-Public Information. (Exceptions 1, 2, 3, 4, 6, 7, 12, 13, 14, 15, 16, 17, 22)

The ALJ found that certain sections of the following Policy provisions advising employees not to reveal non-public information about the Company are unlawful:

> ...be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.... Non-public company information includes:
>
> - Any topic related to the financial performance of the company;
> - Information directly or indirectly related to the safety performance of GM systems or components for vehicles;
> - GM Secret, Confidential or Attorney-Client Privileged information;
> - Information that has not already been disclosed by authorized persons in a public forum; and
> - Personal Information about another GM employee, such as his or her...performance, compensation....

The question before the ALJ was whether employees would reasonably interpret the Policy's privacy and confidentiality provisions as prohibiting discussions protected by Section 7, or reasonably understand the Policy's provisions to protect GM's legitimate interest in the protection of certain undisclosed information. *Lafayette Park* at *827.* The ALJ reasoned that "employees would reasonably read some of [the Policy's] language as prohibiting protected employee communications about terms and conditions of employment, because it expressly prohibits employees from discussing online coworkers' wages and other compensation, as well as working conditions." ALJD at 5. The ALJ did not specifically identify which contested privacy and confidentiality provisions employees might reasonably read as prohibiting communications protected by Section 7; however, he did ultimately conclude that all contested provisions in GM's privacy and confidentiality provisions were unlawful. (ALJD at

10) In support of his finding the ALJ cited *Security Walls, 356 NLRB No. 87 (2011), Cintas Corp., 344 NLRB 943, 943 (2005)*, enfd. *482 F.3d 463, 375 U.S. App. D.C. 371 (D.C. Cir. 2007)*, and *Kinder-Care Learning Centers, 299 NLRB 1171, 1171-1172 (1990).*

As a preliminary matter, it is important to address the ALJ's assertion that GM's privacy and nondisclosure provisions expressly prohibit employees from discussing "...coworkers' wages and other compensation, as well as working conditions." This characterization is not accurate as the provision at issue specifically advises employees not to disclose non-public "[p]ersonal information about another GM employee, such as... medical condition, performance, compensation..." Unlike provisions that are typically found to violate the Act, GM's does not prohibit employees from disclosing their own wages or benefits. And given the context of the entire policy and the conduct of employees using GM sites, there is no reasonable basis for believing that GM would not recognize and respect those discussions of compensation that are actually protected by the Act. Again, the purportedly objectionable language is a mere snippet within a broader policy; and, there is no real basis for reading the policy as an attack on employees' rights to discuss compensation and benefits or to infer that GM would cite this Policy for taking disciplinary action. Rather, the language takes aim at random disclosures that release confidential or personal information without a legitimate basis. In fact, the policy merely reflects legal restrictions imposed on workplace relationships, including ADA, HIPAA, invasion of privacy, public disclosure of private facts, defamation, tortious interference, and other tort claims. The Policy does not, however, preclude employees from freely discussing their wages or terms and conditions of employment; nor can it be reasonably interpreted in that way, given its context.

GM's Policy provisions are distinguishable from those found unlawful by the Board in *Security Walls, Cintas, and Kinder-Care* because of the overall context. GM's privacy and nondisclosure provisions make it clear that the Policy provisions do not impinge on Section 7 activities, and GM has stated legitimate business concerns related to the promulgation of its Policy. (R at 56) The ALJ's reliance on *Security Walls, Cintas, and Kinder-Care* to find that GM's privacy and confidentiality Policy provisions unlawful is misplaced.

The central question in Cintas, Kinder-Care and Security Walls, as in the instant case, is whether employees would reasonably construe the employers' confidentiality rules to prohibit Section 7 activities. In all of the cases cited by the ALJ, the Board focused on the language at issue and its context, as well the employer's legitimate business concerns.

In *Cintas*, the Board found that the employer's unqualified policy contained prohibitions on the release of "any information" by employees regarding "the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" that could lead employees to construe the rule as an unlawful restraint on Section 7 activities. *Cintas* at 943. In *Kinder-Care* the unlawful rule specifically prohibited employees from discussing "terms and conditions of employment". See *Kinder-Care* at 1171 And in *Security Walls,* the employer's confidentiality rule was far more descriptive and expansive in its prohibition on disclosures of confidential information that was defined to include payroll or personnel records, salary/hourly wage rates, benefits, promotions, demotions, etc. The Board, in *Security Walls,* adopted the ALJ's finding that the employer's rule was unlawful because employees would reasonably construe it to restrict Section 7 activities in the absence of any language that "gives employees any assurances that the broad restrictions identified in the policy carve out or exclude discussions that would otherwise be protected

by Section 7 of the Act. More specifically, there is nothing in the policy that clearly explains that the restrictions apply only to 'legitimate business concerns'..." *Security Walls* at 16

GM's privacy and confidentiality provisions are clearly distinguishable from the rules in these cases. First, GM's Policy provisions give employees specific examples of non-public proprietary information and regulated information that should not be disclosed. See *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003) (Finding that the employer's prohibition on disclosures of proprietary information is not a violation of the Act.) GM's inclusion of this information immediately gives employees a frame of reference for the specific types of disclosures that the Company is concerned about and orients employees to GM's legitimate business concerns. (R at 56) Second, the context of the privacy and confidentiality provisions also provides a reasonable basis for employees to understand that the Policy's provisions do not impinge on their Section 7 rights. Specifically, GM's privacy and confidentiality Policy provisions regarding compensation and performance appear in the same sentence as the term "medical condition". The term "medical condition" obviously does not implicate Section 7 activities; therefore, when the sentence is considered as a whole, without parsing the language, it is more likely to suggest to employees that GM is concerned about disclosures of sensitive personal information for inappropriate or unprotected purposes, rather than restraining Section 7 activities. Moreover, when the references to compensation and performance are viewed in the context of the other examples of prohibited disclosures (e.g., undisclosed financial information, GM Secret Information, Confidential, Attorney Client-Privileged information)[8] employees understand that this language does not prohibit protected Section 7 discussions about wages and terms

[8] GM Secret, Confidential, and Attorney-Client Privileged information are defined terms in GM's policy on information management, and employees receive training on handling such information. Therefore when information about compensation is read in the context of these defined terms, employees understand the prohibited disclosures do not restrict Section 7 rights.

and conditions of employment as the ALJ found in his decision. It is important to consider that GM's Social Media Policy does not exist in a vacuum. In fact, GM's employees are aware of related policies respecting the protection of GM's prototype vehicles, and information that GM is legally charged with protecting (e.g., social security numbers, undisclosed financial information, and medical information) (R at 56). The types of prohibited information listed in GM's Policy provide employees with sufficient context to understand that their Section 7 rights will not be restricted. (GC Exh, 1(h))

There is no reason for contortions to find a violation in a snippet. The conduct of GM's employees proves the point that the Policy does not chill rights and that employees do not act as if it does. As introduced at the hearing, GM employees freely discussed and debated about the quality of their wages and conditions of employment on GM's internal social media sites. At the March 15, 2012 hearing, GM introduced posts from employee discussions about wages and benefits that demonstrate employees' reasonable understanding of GM's Social Media Policy. (Exhibit R1).

It is also important to note that, unlike the policies in the cases relied upon by the ALJ, GM's Policy has a Section 7 notice provision that specifically advises employees that GM's Social Media Policy will be administered in compliance with Section 7 of the NLRA.

When GM's Policy provision regarding disclosures of non-public information is given a reasonable contextual reading, without assuming the intent to interfere with Section 7 rights, employees would construe this language as a prohibition on posting non-public information like competitive information related to compensation, or non-public financial information that may be protected by SEC regulations, rather than a restraint on Section 7 activity.

Even if an employee had any doubt as to whether subjects covered by Section 7 are included in the list of non-public information that should not be shared, the Policy's language advising that it will be administered in compliance with Section 7 of the NLRA, would certainly allay those concerns.

C. The ALJ Erred In Finding That GM Violated Section 8(a)(1) Of The NLRA By Maintaining A Social Media Policy That Advises Employees To Check With GM When They Have Doubts About Whether Posting Is Appropriate. (Exceptions 1, 2, 3, 4, 6, 7, 9, 12, 13, 14, 15, 16, 17, 22)

The ALJ found the following Policy provision unlawful:

> When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with GM Communications or GM Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.

It is not unlawful or unreasonable for GM to advise its employees to seek assistance when they are unsure about the handling of GM's non-public proprietary information or non-public information that may be subject to legal restrictions. Furthermore, advising employees to check with GM's Communications Staff or its Legal Staff for advice when they have doubts about whether certain non-public information can be shared outside of the Company is not the same as requiring employees to seek permission. It is unreasonable to believe that any employee in GM's work environment would read the policy to require consultation with GM Legal Staff before engaging in protected concerted conduct or as needing GM's permission to solicit membership in a new union or bargaining unit. In context, the Policy recognizes that there may be questions about whether it is acceptable to disclose non-public company performance or financial information; whether it is okay to discuss innovations or new designs that people are developing, and the like. Any suggestion that the Policy provision requires employees to obtain permission would require an illogical

reading of the Policy provision wherein employees without doubts about posting information are nonetheless required to seek permission from GM Communications or GM Legal before disclosing information. The Policy cannot be read in this manner, no matter what tortured logic is applied to its construction. This Policy provision is didactic and instructive, rather than coercive and unlawful. See Salon/Spa At Boro, 356 NLRB 69, 75 (2010) (finding an employer's warning to her employees about the potential negative effects of poor judgment when using social networking was not coercive).

In finding this Policy provision unlawful, the ALJ reasoned that the provision could reasonably be read to require employees to seek permission before engaging in Section 7 activities. (ALJD at 6) In support of his contention, the ALJ cited *Teletech Holdings, Inc.*, 333 NLRB 402 (2001) and *Brunswick Corp., 282 NLRB 794, 795 (1987).* In *Teletech and* Brunswick, the Board found a rule requiring prior managerial authorization for the distribution of literature in the midst of union campaigns unlawful.

Both *Teletech* and *Brunswick* involve rules that require employees to seek permission before engaging in Section 7 activities. Unlike the rules *Teletech* and *Brunswick* , GM's Policy provision clearly does not require all employees to seek permission before engaging in social media discussions. The Policy provision allows employees to decide for themselves whether they have doubts about the information that they are considering posting. Furthermore, employees are only advised to "[c]heck with GM Communications or GM Legal" if they have doubts about whether information that may fall into one of the categories of prohibited disclosures is a good idea.

The instant matter is also distinguishable from *Teletech* and *Brunswick* because in those cases employees were participating in activities that were clearly governed by Section

7 of the Act, therefore, the rules would reasonably be construed by employees to require them to secure permission from their employers as a precondition to engaging in protected concerted activity. *Lafayette Park* at 827. Here, the rule at issue does not implicate Section 7 activities, so it is more like the rule in *Lafayette Park;* therefore, "a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity... and... employees would recognize the rule for its legitimate purpose, and would not ascribe to it far-fetched meanings such as interference with Section 7 activity." Id at 827

The ALJ's finding with respect to this Policy provision is a major departure from the Board's assertion that it will not find a violation simply because a rule could conceivably be interpreted to prohibit Section 7 activity. See *Palms Hotel and Casino*, 344 NLRB 1363, 1368 (advising "[w]e are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it"); see also *Lutheran Heritage*, 343 NLRB at 647;.

GM employees, who may themselves be affected by the inappropriate disclosure of personal information (e.g., social security numbers, medical information), would reasonably understand and welcome GM providing guidance about the handling of information to the individual in possession of that information. This is especially true when this Policy is viewed in context as required by established case law.

D. **The ALJ Erred in Finding that GM Violated Section 8(a)(1) of the NLRA by Maintaining a Social Media Policy that Advises Employees to Respect Proprietary Information. (Exceptions 1, 2, 3, 4, 7, 10, 11, 12, 13, 14, 15, 16, 17, 22)**

The ALJ found that the following provision in GM's Social Media Policy is unlawful:

- Obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally shareable or that you have the owner's permission...

- Get permission before posting photos, video, quotes or personal information of anyone other than you online....

Contrary to the ALJ's finding of unlawfulness, it is the very lawfulness of these provisions that GM is concerned about. The use of trademarked and copyrighted materials is protected by state and federal laws.[9] For example, it is a violation of numerous state privacy and consumer protection laws to use another person's name or likeness for commercial or advertising purposes.

The ALJ's reliance on the reasoning in *Labinal, Inc.*, 2003 WL 21466432 at (2004), is misplaced, as the facts and issues are so dissimilar that the reasoning is inapplicable. GM's Social Media Policy specifically advises employees of legal pitfalls that they may face in co-opting content that they do not have legal rights to. This advice is no different from advice that employees would find on any social networking website like Twitter or Facebook. Again, GM's advice here is didactic and instructive. *Salon/Spa At Boro*, 356 NLRB 69, 75 These provisions are included in GM's Social Media Policy to advise employees that they could run afoul of trademark and copyright laws by posting certain proprietary information without the permission of its owner. The suggestion that this Policy may chill Section 7 rights is absurd.

Moreover, GM's notice that its Policy will be administered in compliance with Section 7 should address concerns about the farfetched chilling effect that these provisions could potentially have.

[9] The Copyright Act, 17 U.S.C. §§ 101-810 (1976), and the Lanham Act, *15 U.S.C. § 1114(1)(a)*. protect the use of copyrighted material and trademarks in the United States.

E. The ALJ Erred in Determining that the Notice Provision in GM's Social Media Policy does not Adequately Advise Employees that GM's Policy Will be Administered in Compliance with Section 7 of the NLRA and the Policy's References to GM's Existing Company Policies Do Not Provide Useful References to Employees. (Exceptions 1, 2, 12, 13, 14, 15, 16, 17, 22)

The ALJ determined that GM's Section 7 notice in its Social Media Policy does not adequately advise employees that the Policy will be administered in accordance with Section 7 of the NLRA. In support of his conclusion, the ALJ cited *Tower Industries, 349 NLRB 1077 (2007), Ingram Book Co., 315 NLRB 515, (1994), and McDonnell Douglas Corp., 240 NLRB 794, 802 (1979).* These cases do not, however, address the issue before the ALJ. In all three cases the Board found that the exculpatory language in various documents did not relieve the employers of their respective obligations to comply with the law. In this case, the question is not whether the Section 7 notice provision in GM's Policy "shield[s] [GM] from the consequences of unlawfully prohibiting employee activity protected by the Act". (ALJD at 9) The real question here is whether employees would reasonably understand GM's notice provision to mean that they could engage in Section 7 activities on social media sites. GM's answer is yes. The notice is clear, simple and unambiguous – "GM's Social Media Policy will be administered in compliance with applicable laws and regulations(including Section 7 of the National Labor Relations Act). The ALJ also concluded that "employees cannot be expected to know what conduct is protected under the Act". The ALJ's conclusion is disingenuous. On the one hand he found that certain provisions in GM's Policy violate the Act because employees will look past their plain meaning to construe the provisions as prohibiting Section 7 activities; but on the other hand they will not know what those activities are for purposes of reading a notice that states that GM will comply with Section 7. Even if one presumes

that GM's heavily unionized workforce does not know what the NLRA is, the notice provision also advises that the Policy will be administered in compliance with the law. In addition, at the March 15, 2012 hearing, GM's witness testified that GM has posted Section 7 notices at its facility since 2010.(TR. 110 15-25; 111 4-25)

The ALJ also concluded that GM's prefatory language advising that the Policy is a restatement of GM's existing rules (i.e., "New Tools, Old Rules") will not cure perceived flaws in GM's Policy because (1)the existing policies are not set out and references are not provided, and (2) "requiring employees to ascertain the full scope of existing policy imposes a wholly untenable--if not impossible--burden on them. "(ALJD at 10) First, GM's Social Media Policy does reference other GM policies. For example, the Policy advises that employees should "[s]ee the Corporate Policy Manual for all GM Policies." (GC Exh. 1(h)) In addition, there is a section in the Social Media Policy entitled "Other GM Policies that Apply" that does, in fact, deal with other GM policies.

Second, it is not unlawful or unreasonable for employers to expect that employees will read and understand the full scope of policies promulgated in the context of the employment relationship. See *Ingram Book Co.,* 315 NLRB 51, 516 (reasoning that whether employees were actually aware of a work rule was irrelevant, as knowledge was imputed because the rule appeared in a handbook that was specifically designed for and distributed to them.)

F. The ALJ Erred in Issuing His Remedy, Recommended Order, and Notice. (Exceptions 18, 19, 20, 21, 22)

The Remedy ordered by the ALJ is clearly erroneous because there is no legal basis for the Remedy. Specifically, the ALJ's conclusion that GM committed an unfair labor practice in violation of the NLRA is not supported by the record evidence. Moreover, the remedial order

requires GM to rescind any disciplinary action under the Policy and pay back pay; however, Counsel for the Acting General Counsel did not allege that GM had actually enforced its Policy against any employee, nor did Counsel for the Acting General Counsel present evidence to support such a contention. Furthermore, the Remedy ordered by the ALJ is vague and ambiguous as it does not describe the activities to be enjoined with sufficient specificity. GM is, therefore, left without adequate notice of its legal obligations for purposes of compliance.

The ALJ's recommended Order is also erroneous because his conclusion that GM committed an unfair labor practice in violation of the NLRA is not supported by the record evidence, nor has Counsel for the Acting General Counsel presented any evidence that any GM employee has been subjected to discipline under GM's Policy. The Order is also vague and ambiguous because it does not describe with sufficient specificity the activities to be enjoined; therefore, it deprives GM of notice of its legal obligation with respect to compliance.

The ALJ's Notice is also clearly erroneous because his conclusion that GM committed certain unfair labor practices is not supported by the record evidence, nor has Counsel for the Acting General Counsel presented any evidence that any GM employee has been subjected to discipline under GM's Policy. Moreover, the Notice, like the recommended Order and Remedy, is vague and ambiguous as it fails to describe with sufficient specificity the activities to be enjoined. As a result, GM is deprived of notice of its legal obligation with respect to compliance.

CONCLUSION

The Policy provisions that the ALJ found unlawful in GM's Social Media Policy cannot reasonably be construed to chill Section 7 activity. A reasonable reading of these provisions in the context of the overall Policy, and without the presumption of improper interference with employee rights clearly leads to the conclusion that employees' Section 7 Activities are not impinged upon.

Accordingly, GM's Exceptions should be granted, and the ALJ's Decision, which concludes that the Company's Social Media Policy violates Section 8(a)(1) of the Act, must be reversed.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC,

Respondent

CASE 07-CA-053570

and

Michael Anthony Henson
Charging Party

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS:
COUNTY OF WAYNE)

I, Onika C. Celestine, hereby certify that on the 22nd day of August 2012, I served a copy of BRIEF IN SUPPORT OF GENERAL MOTORS LLC'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE, in ***General Motors, LLC, Case 07-CA-053570***, upon all parties of record, by electronic transmission, as follows:

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Subscribe and sworn to before me
this 22nd day of August 2012.

Notary Public

TIA TURK
Notary Public, State of Michigan
County of Wayne
My Commission Expires Jan. 15, 2017
Acting in the County of Wayne